No. 89-1430

In The

Supreme Court of the United States

October Term, 1989

BILLY RAY APPERSON and DON APPERSON,
Individually And On Behalf of a Class,

Petitioners,

v.

FLEET CARRIER CORPORATION;
LOCAL 614 OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
and FLEET CARRIER DEALERS SERVICE,
a Michigan corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS FLEET CARRIER CORPORATION AND FLEET CARRIER DEALERS SERVICE BRIEF IN OPPOSITION

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QUESTION PRESENTED

PETITIONERS' PHRASING OF THE QUESTION INCORRECTLY PRESENTED THE FINDINGS AND HOLDING OF THE DECISION BELOW. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT SIMPLY RECOGNIZED THAT HAD THE ARBITRATOR IN QUESTION BEEN A FEDERAL JUDGE, FEDERAL STATUTES WOULD HAVE REQUIRED HIS RECUSAL FROM THE CASE. IT DID NOT FIND THAT THE ARBITRATOR APPEARED TO BE BIASED.

THE QUESTION PRESENTED SHOULD HAVE BEEN PHRASED:

> WOULD A REASONABLE PERSON FIND THAT A MEMBER OF A BIPARTISAN GRIEVANCE PANEL WAS BIASED WHERE HE HAD BEEN A LAW PARTNER OF ONE OF THE DEFENSE COUNSEL YEARS BEFORE, HAD NEVER WORKED ON THE CASE, HAD NO PERSONAL INTEREST IN OUR KNOWLEDGE OF THE GRIEVANCE OR THE LAWSUIT PRIOR TO HIS APPOINTMENT TO THE PANEL AND HAD NO FINANCIAL INTEREST IN THE GRIEVANCE OR IN THE LITIGATION?[1]

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[1] Fleet Carrier Corporation and Fleet Carrier Dealers Service are subsidiaries of Fleet Transportation Services, Inc. a wholly owned subsidiary of Ryder Systems, Inc., a publicly owned corporation.

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RESPONDENTS FLEET CARRIER CORPORATION AND FLEET CARRIER DEALERS SERVICE BRIEF IN OPPOSITION

Respondents Fleet Carrier Corporation and Fleet Carrier Dealers Service respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case. That court's decision is reported at 879 F2d 1344 (1989).

COUNTER-STATEMENT

This is a "hybrid" §301 and duty of fair representation action.

Fleet Carrier Corporation ("Fleet") is a trucking company engaged in the interstate transportation of new motor vehicles. Fleet is compensated for its services via a published tariff which varies depending on the weight of the vehicles carried and the distance they are transported. Fleet Carrier Dealers Service ("Dealers Service") is a corporation responsible for inspecting and accepting newly manufactured vehicles from the Truck and Bus Division of General Motors Corporation ("GM"), the transportation of those vehicles to storage facilities and the preparation of those vehicles for shipment. Dealers Service is compensated for its services by a per vehicle releasing and terminal handling charge it negotiates with GM. Fleet and Dealer Service are separate companies that have common ownership, share common facilities and have some common personnel. (2-3a)[2]

Local 614 is a local labor union that represents the union employees of Fleet and of Dealers Service for collective bargaining purposes. Fleet and Local 614 have been parties to an industry wide collective bargaining agreement which has been renegotiated at three (3) year intervals since at least June 1, 1976 ("the Contract"). (3a)

Petitioners are brothers who were employed by Fleet as "brokers". They were members of Local 614. Although they have sought to represent a class of Fleet brokers, a

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[2] References to the Appendix to the Petition for Certiorari will be denoted as ___a.

class has not been certified. Brokers lease a power unit to Fleet which is connected to a Fleet trailer and used to transport the motor vehicles. Petitioners were never employed by Dealers Service. (3a)

Article 62 of the Contract provides the method by which broker compensation is determined. Article 7 of the Contract establishes a grievance and arbitration procedure covering:

> "any and all disputes, including interpretations of contract provisions arising under, out of, in connection with, or in relation to this collective bargaining agreement . . . " Article 7, Section 11.

Under the grievance procedure, disputes are first discussed orally at the local level. If they are not resolved there, they are reduced to writing and referred to a series of bipartite grievance committees. Each committee is composed of equal numbers of management and union representatives who resolve disputes by majority vote. A tie vote ("deadlock") refers the grievance to the next higher committee. Those committees meet at the local, regional and national levels. Article 7, Section 6 of the Contract provides that a decision by a majority of a panel of any of the joint arbitration committees "shall be final and binding on all parties, including the employee and/or employees affected." (4a)

On September 10, 1980, Acting Steward, Billy Ray Apperson, filed a grievance claiming violation of Article 62 of the Contract contending that the Fleet brokers were entitled to a portion of the terminal handling and releasing charge paid to Dealers Service by GM. After discussion at the local level, the case was referred to the Tri-City Joint Arbitration Committee (the local grievance

committee). The Tri-City Committee referred the case to the Central/Southern Joint Arbitration Committee (the regional grievance committee). At a meeting held in August 1982, that Committee endorsed and accepted a negotiated grievance settlement agreed to by Fleet, Local 614 and Mr. Apperson, among others. (5a)

A subsequent dispute over the settlement resulted in a new grievance filed by Local 614. It was heard by the Central/Southern Committee on February 2, 1982. During the course of that hearing, the Company and Union agreed that the Company was then in compliance with the grievance settlement terms, although Billy Ray Apperson disagreed. The Committee accepted the settlement and retained jurisdiction. (7a)

This action was filed in March, 1982. On April 30, 1985, after several years of discovery and as a result of deposition testimony and other evidence obtained in the course of that litigation, Local 614 filed a new grievance. In its grievance, Local 614 asserted that Fleet materially breached the August, 1981 settlement agreement and argued that the agreement should be set aside, the brokers' grievance heard and upheld on its merits and that all affected brokers would receive backpay. (8a)

The Central/Southern Grievance Committee met on the Local 614 grievance in November, 1985 and deadlocked, thereby referring the case to the National Joint Arbitration Committee. (9-10a)

On February 6, 1986, the National Negotiating Committee heard the grievance, including presentations by Local 614, Billy Ray Apperson and representatives of Fleet. In its decision, the Committee specifically found

that there was no contractual violation since the grievance sought a percentage of charges paid to a company different than the carrier (employer of the brokers). (11-12a)

From the inception of the action and throughout its history, Fleet (and later Dealers Service) was represented by A. Read Cone. When the suit was filed in 1982 Mr. Cone was a partner in the "Matheson firm"[3]. Another partner in that firm was Robert Parr. In 1983, Mr. Cone, Ian Hunter and a third attorney left the Matheson firm and formed a new firm. Since that departure, Fleet had been billed a total of $100.00 by the Matheson firm for some research into a file by an attorney other than Mr. Parr. (31a)

When the grievance was called at the National Committee meeting, Ian Hunter, the Employer Co-Chair, voluntarily withdrew from the hearing panel and, pursuant to the Committee Rules, appointed Robert Parr as Employer Co-Chairman. (20a) During his presentation at the Committee hearing, Billy Ray Apperson presented a statement which, in addition to a general challenge to the panel members, stated that the "Company Co-Chair is an attorney for Fleet". It also argued that it was inappropriate for the Committee to hear the grievance. There is no record of a response to this statement by the Committee. In June 1986, by written decision the Committee denied the grievance. (11a)

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[3] Matheson, Bieneman, Parr, Schuler and Ewald.

PROCEEDINGS BELOW

Petitioners have focused on only one of the issues dealt with by the district court and court of appeals. Thus, although Petitioners raised several claims of bias or evident partiality on the part of some of the participants in the National Committee decision, they have apparently accepted the decision of the court of appeals with regard to those issues, focusing solely on the purported partiality of a single panel member.

The district court dismissed Petitioners' claims with regard to Mr. Parr on two grounds. First, the court found that the Petitioners had not clearly and adequately expressed an objection to Parr's presence on the grievance committee.[4] Secondly, the district court held that, on the record before it, there was no showing of evident partiality as to Parr. (50a)

In rejecting Petitioners' claim of Parr's evident partiality, the district court noted:

> "The court finds the relationship between Robert Parr and FCC is not sufficient to suggest evident partiality. As Plaintiffs themselves admit, Mr. Parr's personal participation in defending this lawsuit has not been shown. Additionally, uncontroverted affidavits establish that, although one attorney who handles cases for FCC was affiliated with Mr. Parr's law firm at one point in time, that affiliation ceased well in advance of the National Committee's decision."

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[4] The court of appeals reversed the district court on this point finding the written statement (prepared a day before the hearing) sufficient to "save" the issue of Parr's partiality. (30a)

The district court went on to apply the reasonable person test stating that because there was no showing that Parr's firm was currently affiliated with an attorney representing FCC, a reasonable person would not conclude that he was evidently partial, therefore, Petitioners had failed to establish that he was evidently partial.[5] (50-51a)

In its review of the district court's decision, the court of appeals agreed that no evident partiality had been shown. The court noted that there was no evidence showing any personal interest in or knowledge of the original grievance or the lawsuit prior to Parr's appointment as Co-chair. It stated that Petitioners did not deny that Parr had never worked on the case while previously associated with the attorneys for Fleet. It also noted that his relationship with those attorneys terminated more than two and one-half (2-1/2) years before the National Committee decision. Over that two and one-half (2-1/2) year period Parr's firm had billed Fleet for one hour of work, in the amount of $100.00, concerning the retrieval of documents in the firm's possession, which work was not performed by Mr. Parr. In reviewing that evidence, the court of appeals determined that Parr neither had personal knowledge nor a financial interest in the grievance or the litigation. In addition, Petitioners had not

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[5] The party challenging an arbitration award has the burden to prove facts to establish a reasonable impression of partiality of an arbitrator *Middlesex Mutual Insurance Co. v. Levine*, 675 F2d 1197, 1201 (11th Cir., 1982); *Sheet Metal Workers International Association v. Kinney Air Conditioning Co.*, 756 F2d 742, 745 (9th Cir., 1985).

shown that he had ever done legal work for Fleet. Adopting the reasonable person standard, the court of appeals rejected the claim of evident partiality as to Parr. (31a)

REASONS FOR DENYING THE PETITION

The Petition raises no special and important reasons for granting the Writ as required by Rule 10.1 of this Court because the decision below is consistent with relevant precedent of this Court and there is no conflict among the courts of appeal. Further, this is not an appropriate case to resolve the issue asserted by Petitioners.

A. There is no conflict among the circuits.

The narrow issue suggested for review by the Petition for Certiorari raises the question of the appropriate standard for determining arbitrator partiality. In *Commonwealth Coatings Corp. v. Continental Casualty Company*, 393 US 145 (1968), a commercial arbitration case, Justice Black writing on behalf of a plurality suggested a standard of impartiality on the part of arbitrators akin to that of Article III Judges. Justices White and Marshall, though concurring in the result, specifically disavowed this section of Justice Black's opinion, stating:

> "The court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. (Citation omitted). This does not mean that the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does

> mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." 393 US at 150.

The Court of Appeals of the Second Circuit, beginning with *International Produce, Inc. v. A/S Rosshavet*, 638 F2d 548 (2nd Cir., 1980), has consistently held that evident partiality requires more than a mere appearance of bias. See *Morelite Construction Corp. v. New York City District Council Carpenters' Benefit Fund*, 748 F2d 79 (2nd Cir., 1984); *Local 814 v. J & B Systems Installers*, 878 F2d 38 (2nd Cir., 1989). The Sixth Circuit adopted that position in the instant case. The Seventh Circuit followed the same theory in *Merit Insurance Company v. Leatherby Insurance Company*, 714 F2d 673 (7th Cir., 1983) cert denied 464 US 1009 (1983). The Ninth Circuit has followed that reasoning in two cases, *Toyota of Berkley v. Local 1095*, 834 F2d 751 (9th Cir., 1987) and *Sheet Metal Workers v. Kinney Air Conditioning Co.*, 756 F2d 742 (9th Cir., 1985). The Tenth Circuit followed this reasoning in *Ormsbee Development Co. v. Grace*, 668 F2d 1140 (10th Cir., 1982) cert denied 459 US 838 (1982).

The majority of the decisions cited above have adopted the Second Circuit's *Morelite* standard that evident partiality:

> "will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." 748 F2d at 84.

In *Toyota*, the Ninth Circuit stated that "the party alleging bias must establish facts that create 'a reasonable impression of partiality'." 834 F2d at 756. In *Sheetmetal Workers*, the same court stated:

> "The appearance of impropriety, standing alone, is insufficient." 756 F2d at 746.

The Seventh Circuit in *Merit Insurance* stated:

> "If circumstances are such that a man of average probity might reasonably be suspected of partiality, maybe the language of section 10(b) can be stretched to require disqualification. But the circumstances must be powerfully suggestive of bias . . . " 714 F2d at 681.

While the Tenth Circuit in *Ormsbee* did not specifically apply a reasonable person standard, it did find that:

> "[I]t is only clear evidence of impropriety which justifies the denial of summary confirmation of an arbitration award." 668 F2d at 1147.

Further, the court went on that:

> "For an award to be set aside, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain or speculative." 668 F2d at 1147.

Citing *Tamari v. Bache Halsey Stewart, Inc.*, 619 F2d 1196 (7th Cir., 1980). Thus, while the court did not specifically apply the reasonable person standard, it required more than the mere appearance of bias to establish partiality.

The cases cited by Petitioners to support their claim of conflict among the circuits do not support their arguments. For example, *Sanko SS Co., Ltd. v. Cook Industries, Inc.*, 495 F2d 1260 (2nd Cir., 1973) is no longer valid in light of the Second Circuit's decision in *Morelite*, 748 F2d 79 and the subsequent decisions by that Circuit.

In *Middlesex Mutual*, another commercial arbitration case, the Eleventh Circuit, despite recognizing the conflict in *Commonwealth Coatings*, never resolved the conflict. The court noted that on its facts the possibility of bias was "direct, definite and capable of demonstration rather than remote, uncertain and speculative", citing *Tamari*, 675 F2d at 1202. It reviewed the challenged neutral arbitrator's deposition testimony and concluded his denials were "spurious" and that his failure to disclose pertinent facts violated his oath and American Arbitration Association rules governing the arbitration. The court found the neutral arbitrator had "repeated" and "significant" business dealings involving thousands of dollars with one of the parties to the arbitration over a period of four or five years. 675 F2d 1202.

Petitioners' reliance on *Tamari* for the principle that there is a conflict as to which standard to apply in the Seventh Circuit is equally misplaced. The *Tamari* court carefully examined and rejected each claim of bias or taint before it – an exercise inconsistent with a mere appearance of bias analysis. Petitioners citation from *Tamari* relies on a quote from a footnote at page 1198 of the court of appeals decision. The quote cited is only a portion of the total statement made by the court and is taken out of context. Prior to the section quoted by the Petitioners, the court of appeals stated:

> "*Commonwealth Coatings* held that Section 10(b) implicitly allowed the setting aside of arbitration awards where one or more arbitrators 'might reasonably be thought biased against one litigant and favorable to another.' " (citation omitted) 619 F2d at 1198 note 3.

In the context in which it appears, the fair meaning of the court is that it requires more than the mere appearance of arbitrator bias to find partiality.

B. This is not an appropriate case to resolve the issue asserted by Petitioners.

Petitioners also assert that "this is the appropriate case for the court" to resolve their perceived discord among the circuits on the issue of arbitrator partiality. In fact, this is not a case which would support such a determination.

The arbitration procedure utilized here is that of a joint committee structure. The joint committees here were composed of equal numbers of management and union representatives by definition not "disinterested arbitrators".[6] The composition of the arbitration panel does not include a disinterested arbitrator.[7] Thus, even if Petitioners were able to sustain their putative claim of partiality, they cannot demonstrate that that partiality prejudiced them. See *J & B Systems Installers*, 878 F2d 38.

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[6] Nonetheless, this system has been specifically endorsed by the courts "the joint labor management committees created under the collective bargaining agreements between the Teamsters and the freight industry reflect a mature and enlightened method to resolve industrial disputes. These institutions implement the national labor policy as mandated by Congress and will be given maximum respect by the courts." *Teamsters Local 30 v. Helms Express, Inc.*, 591 F2d 211 (3rd Cir., 1979), cert den. 444 US 837 (1979).

[7] A deadlock by the National Negotiating Committee would have referred the grievance to an arbitration panel containing a neutral arbitrator.

Petitioners' implicit assertion that a vote against their position was a vote in favor of Fleet is similarly flawed. The issue presented to the National Grievance Committee dealt with the interpretation of contract language in light of what the Committee found to be a common factual circumstance. Thus, in reaching its decision, the grievance panel rendered a decision which reached beyond the parties before it. The decision interpreted the language of the collective bargaining agreement in light of a common industry practice. (11a) Thus, the decision was not narrowly construed to apply to the parties before the Committee, but was decided in a larger contractual sense. Petitioners' characterization that the decision somehow reflected a company versus employee determination is not supported by the overall facts.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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